

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3039 OF 2006

Dhondu (Devendra) Barku Shirasath

..Petitioner.

Vs.

Sitaram Bhivaji Vankede

..Respondent.

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Mr. Sandesh D. Patil for the Petitioner.

Mr. Rajesh S. Dadar for the Respondent.

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CORAM: DR. D.Y. CHANDRACHUD, J.

11th July, 2006.

P.C. :

1. Rule. By consent of the learned counsel and at their request heard forthwith.

2. The Respondent has instituted a suit against the Petitioner for the recovery of possession of tenanted property. The suit which was instituted on 30th July, 2005 is pending before the Court of the Civil Judge, Junior Division, Nashik. Summons were issued to the Petitioner on 17th August, 2005. On 8th September, 2005 the Trial Judge passed an order directing that despite the service of the summons vide Exh.6, the Petitioner has failed to appear before the Court. Hence, the suit was directed to

proceed ex parte against the Petitioner. The Petitioner thereupon moved an application on 6th October, 2005 for setting aside the direction to proceed ex parte and for permission to take the written statement on record. The application was dismissed by the impugned order dated 3rd December, 2005.

3. In so far as the order to proceed ex parte is concerned, it has been observed by the Trial Judge that the report of the Bailiff showed that the Petitioner had refused to sign the summons which were served under Order 5 Rule 17 of the Code of Civil Procedure. Order 5 Rule 17 deals with the procedure when the defendant refuses to sign the acknowledgment. On behalf of the Petitioner, it has been submitted that even if the procedure under Order 5 Rule 17 of the Code of Civil Procedure is held to apply in the present case on the ground that the Petitioner had failed to sign the acknowledgment, the Trial Court was duty bound to follow the procedure prescribed by Rule 19. Rule 19 of Order 5 reads as follows:

“19. Examination of serving officer – Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be

so examined by another Court, touching his proceedings, and may make such further enquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.”

These provisions have been dealt with in two judgments by a Learned Single Judge of this Court in **Ramdhanlal Moharajdin Jaiswal v. M/s. Pralhad Agency¹** and **Baburao Soma Bhoi v. Abdul Raheman Abdul Rajjak Khatik²**. In the first of these judgments, the Learned Single Judge held as follows :

“Order 5, Rule 19 of the Code of Civil Procedure requires that if the summons is returned under Rule 17 and has not been verified by the affidavit of the serving Officer, then the Court shall examine the process server and make further inquiry to satisfy that the summons has been properly served and thereafter declare that the summons has been served. If the Court is not satisfied, then in that circumstances the Court may further direct a service of summons. The importance of Rule 19 is that the Court has to be satisfied with a report submitted by the process server and if the Court finds that the service is proper on the basis of the report, then only the Court has to declare that the service is proper and then proceed in accordance with law.”

The same view was reiterated in the subsequent judgment.

4. In the present case the Trial Judge has not applied his mind to the requirement of Order 5 Rule 19. Counsel appearing for the Respondent has drawn the attention of the Court to the fact

1 1999(3) Mh. L. J. 923.

2 2000(1) Bom. C. R. 306.

that the report of the Bailiff has been verified. Even if that be so, under Order 5 Rule 19 the Trial Court has the discretion if the return has been verified to examine the serving officer on oath or to cause him to be examined by another Court touching his proceedings and to make a further enquiry as deemed fit. The Court is empowered thereupon to declare that the summons has been duly served or order such service as it thinks fit. In my view, it is necessary for the Trial Court to apply its mind to the provisions of Order 5 Rule 19 and thereafter pass such order as it thinks appropriate. In order to facilitate this process, the impugned order dated 8th September, 2005 is quashed and set aside and the proceedings are remitted back to the Learned Trial Judge.

5. In so far as the question of extension of time to file the written statement is concerned, on the request of Counsel appearing for the Petitioner, leave is granted to withdraw the application with liberty to file a fresh application with all relevant particulars. The Trial Court on such application being filed will consider whether an exceptional case, as laid down in the judgment of the Supreme Court in **Salem Advocate Bar**

Association v. Union of India³. Has been made out and pass orders thereon.

6. The Petition is accordingly disposed in these terms.

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³ AIR 2005 SC 3353.